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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC.
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF RESPONDENT MOBILE STEAMSHIP ASSOCIATION

Frank McRight
Kirk C. Shaw
1101 Merchants National Bank Building
Mobile, Alabama 36602
Attorneys for
Mobile Steamship Association

OF COUNSEL:
Armbrecht, Jackson & DeMouy
Mobile, Alabama

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BRIEF OF RESPONDENT MOBILE STEAMSHIP ASSOCIATION

OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama, is reported at 291 Ala. 201, 279 So.2d 467, and is set forth in the Appendix at 5a-26a.

The denial by the Supreme Court of Alabama of Petitioners' application for rehearing, which is dated July 5, 1973, and which was entered without opinion, is set forth in the Appendix at 27a.

The order of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is set forth in the Appendix at 28a-30a.

JURISDICTION

The basis of the Court's jurisdiction is adequately set forth in Petitioners' brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution are set forth in the Appendix at 4a. Sections 7 and 8(b)(4) of the National Labor Relations Act are printed at 1a-3a of the Appendix.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Mobile County, Alabama, erred in concluding that it had jurisdiction to enjoin picketing by American unions in a dispute with foreign-flag vessels manned by foreign crews.

2. Whether the interlocutory order of the Circuit Court of Mobile County, issued in the presence of a "substantial" question involving disputed facts and reviewed by the Supreme Court of Alabama only to ascertain that the trial judge had jurisdiction of the subject matter and that he had not abused the discretion given him in such matters, is a "final" judgment for review under 28 U.S.C. §1257.

3. Whether the evidence presented to the Circuit Court of Mobile County provided that court with a basis for concluding that the picketing violated state policy in a domain open to state regulation.

STATEMENT OF THE CASE

In the fall of 1971, at the peak of soybean harvesting season in the southern United States, commerce through Alabama's only seaport, the Port of Mobile, was halted by a series of work stoppages and picketing in the Port. This is an appeal of a temporary injunction entered to stop picketing which had as its stated aim the complete blockage of all foreign-flag shipping through the Port of Mobile.

The Parties

Respondent Mobile Steamship Association is a nonprofit corporation composed of members who are in the shipping business in the Port of Mobile (App. 67a). Its membership includes stevedoring companies, steamship agents and steamship companies (U.S. flag) who do business in the Port. Respondent Robert Malone is a local farmer who grows soybeans at his farm near Wilmer, Alabama (App. 79a). Petitioners are American maritime unions which represent the substantial majority of American seamen (App. 95a).

The Picketing

For several weeks prior to the commencement of picketing by Petitioners, longshoremen represented by the International Longshoremen's Association

("ILA")* had been on strike, causing a halt to all loading and unloading of vessels in the Port of Mobile (App. 68a). This strike was restrained at noon on November 3, 1971, on application by the National Labor Relations Board (App. 69a). A few minutes after the District Court advised the parties to that proceeding that the restraining order would issue, Petitioners established a picket line at all entrances to the Alabama State Docks (App. 69a, 132a, 133a).** Pickets carried signs which complained of "substandard" wages paid to foreign seamen and requested the "public" not to "patronize" foreign-flag vessels in port at that time: the *AQUA GLORY* (Liberian flag); the *BEL HUDSON* (English flag); the *PRESIDENT QUEZON* (Philippine flag); and the *ILKON TAK* (Liberian flag) (App. 70a, 96a). Petitioners' picketing had the effect of causing longshoremen engaged in the loading and unloading of these vessels to refuse to cross the picket lines, thus halting the loading and unloading of the foreign vessels (App. 71a). It also prevented members of the Mobile Steamship Association from carrying out their agreements with the shipowners to load and unload the four ships (App. 71a).

Similar picketing was conducted in the Ports of Houston, New Orleans, Wilmington, San Francisco,

*The Petitioners and the ILA are all affiliated with the AFL-CIO, which has appeared as amicus in this matter. One Respondent, the Masters, Mates and Pilots, is actually a division of the ILA.

**All docks, wharves, elevators and warehouses comprising port facilities in the Port of Mobile are owned and operated by the State of Alabama through its State Docks Department. See discussion *infra*.

Portland, Seattle and Duluth and was planned to be extended to other ports subject only to Petitioners' financial resources (App. 95a).

Before the picketing began, Petitioners requested permission to enter the State Docks' premises to conduct their picketing alongside the foreign-flag vessels. Their request was refused by the State Docks Supervisor (App. 96a). After two days of picketing, however, officials of the State Docks relented and allowed Petitioners to enter the State Docks' premises to lessen the effect of their picketing (App. 96a).

Purpose of the Picketing

At the hearing on the temporary injunction, Petitioners claimed, as they do here, that their picketing was for the purpose of informing the American public of the plight of American seamen who had lost job opportunities to foreign seamen crewing foreign vessels. However, Petitioners' only witness, Louis Neira, revealed in his testimony that the unions also had other motives. Mr. Neira testified on cross-examination as follows:

(App. 125a-126a)

"Q. Now, Mr. Neira, are you familiar with the type flag vessels that call at the Port of Mobile?

A. Oh, yes.

Q. What percentage of the vessels that call here at the Port are of foreign flags?

A. I would say about 70 to 80 percent.

Q. Yes, sir. And it's your instructions from your International Headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile?

A. Within my resources, yes, to picket every one.

Q. All right, sir. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good Union men would not cross those picket lines?

A. We were hoping that they wouldn't do that.

Q. Yes, sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true?

A. Well, to a point, yes.

Q. Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or unloading cargo?

A. My hope is to clutter up the Port of Mobile with foreign ships — Liberian, Panamanian ships — to bring sufficient pressure on the United States Government to do something about the American merchant marine.

Q. That's your intention?

A. Yes, sir.

Q. That's your purpose?

A. Yes, sir."

(App. 130a)

"Q. ... You realize that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing?

A. I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association."

(App. 140a)

"Q. Mr. Neira, you are trying to prevent the AQUA GLORY's last remaining cargo from being discharged and her being used to carry a cargo of grain [soybeans], aren't you?

A. Yes."

Effect of the Picketing

At the time Petitioners began their picketing, farmers in the southern United States were harvesting their soybean crop, much of which was to be exported for sale overseas (App. 74a, 77a-80a). An estimated 13,000,000 bushels of soybeans, valued in excess of $50,000,000, were in the fields of Alabama and in the elevators at the Alabama State Docks, waiting to be shipped through the Port of Mobile (App. 74a). Soybeans must be harvested when ripe, otherwise they will be lost (App. 77a, 78a). The elevators at the Alabama State Docks and other storage facilities can accommodate only a small amount of the annual crop so there must be a continuous flow through the State

Docks' facilities into ships for carriage (App. 74a, 78a, 86a, 87a).

Petitioners' picketing brought an immediate halt to the loading and unloading of ships at the State Docks (App. 61a-75a). As a result of the longshoremen's refusal to cross Petitioners' picket lines to load or unload vessels, millions of bushels of soybeans were in danger of being lost through spoilage (App. 74a).

The Alabama State Docks' facilities were largely idled by the picketing (App. 74a). Member companies of the Mobile Steamship Association lost in excess of $15,000 per day in fixed overhead costs while the picketing continued (App. 73a). Charterers of ships forfeited vessel demurrage costs ranging from $2,000 to $5,000 per day per vessel (App. 73a) and ocean freight revenues at the rate of $35,000 per day per vessel (App. 74a).

Other facets of the Mobile economy were affected by the picketing at the State Docks. It has been estimated that the Mobile economy loses in excess of $3,300,000 per week from a work stoppage in the Port (App. 74a). Thus, the work stoppage caused by Petitioners had an immediate and significant impact on the economy of Mobile and its neighboring communities. Other forms of transportation, such as rail, barge, and truck lines, which would normally have been busy moving cargo in and out of the Port were idled with resultant losses (App. 74a). Manufacturers dependent upon raw materials flowing through the State Docks were slowed in their production (App. 74a).

The Litigation

On November 5, 1971, the Mobile Steamship Association filed an action in the Circuit Court of Mobile County, Alabama, seeking temporary and permanent injunctive relief against Petitioners' picketing (App. Ia). The trial judge refused to grant *ex parte* injunctive relief and ordered that the matter be set down for hearing. Shortly thereafter, Respondent Malone applied for and was given permission to file a complaint as intervenor. Following an unsuccessful effort by Petitioners to remove the case to the U.S. District Court (App. Ia), the matter was heard on November 10, 1971. The parties presented affidavits, oral testimony and exhibits. After the hearing, the court took the matter under submission and on the following day entered an order granting temporary injunctive relief. The temporary injunction was conditioned on Complainants' posting a bond of $5,000 to pay all damages and costs of the unions if the injunction were dissolved (App. 145a).

Petitioners made no effort to seek a hearing on the merits, or to modify the temporary injunction, or to have the trial court enter findings of fact or conclusions of law. Instead, they elected to take an immediate appeal to the Supreme Court of Alabama.*

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*This appeal could have been expedited, Ala. Code, tit. 7, §1057 (1958); Petitioners delayed its hearing for over a year by requesting and obtaining eight extensions of time for the filing of the transcript and their brief.

While Petitioners' appeal to the Alabama Supreme Court was pending awaiting their brief, Petitioners filed a separate action in the United States District Court for the Southern District of Alabama seeking to restrain enforcement of the state court's injunction. The District Court refused preliminarily to enjoin the state court proceedings, and Petitioners appealed to the Fifth Circuit Court of Appeals. That court affirmed the District Court's decision, holding that the District Court had not abused its discretion in refusing the requested preliminary relief. *American Radio Association v. Mobile Steamship Association*, 483 F.2d 1 (5th Cir. 1973).

Subsequently, Petitioners' appeal of the temporary injunction was argued to the Supreme Court of Alabama which, on May 3, 1973, affirmed the lower court's order (App. 5a). Petitioners' application for rehearing was denied on July 5, 1973 (App. 27a). In its opinion, the Alabama Supreme Court noted that while a "substantial" question of fact concerning the true purpose of Petitioners' picketing "remained to be decided", the "immediate [economic] circumstances obliged [the Circuit Judge]", in the exercise of the "wide discretion accorded him in a matter of this kind", to order the temporary writ (App. 23a). The court reviewed the evidence concerning the purpose of picketing, particularly the testimony of Mr. Neira, and concluded that the Alabama policies of "balancing conveniences" and "maintaining the status quo" until a final hearing were best served by ordering a temporary injunction since "the issue of who will prevail on final hearing is not concluded on a preliminary hearing to determine whether an injunction *pendente lite* will issue or not" (App. 22a).

SUMMARY OF ARGUMENT

1. Preemption

The Court's decision in *Windward Shipping (London) Ltd. v. American Radio Association* ____ U.S. ____, 94 S.Ct. 959 (1974), is dispositive of the preemption issue here. In *Windward*, the Court held that the jurisdiction of Texas state courts over picketing of the type conducted by Petitioners in this case was not preempted by the National Labor Relations Board because the picketing interfered with the maritime operations of foreign vessels and, was not, therefore, "in commerce" within the meaning of the National Labor Relations Act.

Petitioners attempt to distinguish *Windward* from the case at bar on two bases. First, they argue that *Windward* was limited to picketing of foreign-owned, foreign-flag vessels and left open the pre-emption question with respect to American-owned, foreign-flag vessels "flying Panamanian, Liberian or Honduran flags." Not only is that distinction factually unsupported, it is a distinction which this Court has considered and rejected in *McCulloch v. Marineros de Hondurus*, 372 U.S. 10 (1963). There the NLRB argued that under its "balancing of contracts" theory it properly exercised jurisdiction over American-owned, foreign-flag ships, even though it had been denied jurisdiction over foreign-owned, foreign-flag ships six years

earlier in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957). This Court rejected the NLRB's argument concluding that the question was more basic: "namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19. The Court held in *McCulloch* that Congress did not intend the Act to so apply. That conclusion was affirmed by the Court in *Windward* and is applicable here.

Petitioners' second attempted distinction between *Windward* and the case *sub judice* is that because the instant suit was filed by American stevedores, and not foreign shipowners, the dispute is between American parties and is "in commerce" within the meaning of the Act. That reading of *Woodward* misses the *ratio decidendi* of the case which was that because the picketing interfered with the maritime operations of foreign-flag vessels, it was not "in commerce." The identity of the vessels, and the circumstances surrounding the picketing of them, were the important considerations in *Windward* — not the identity of the party seeking to restrain the picketing. Both the foreign shipowners and the American stevedores were injured by Petitioners' conduct which, because it interfered with the maritime operations of the foreign vessels, was outside the NLRB's jurisdiction. That the injunction was obtained here by American stevedores, and not the foreign shipowners, does not alter the fact that the NLRB does not have jurisdiction of the underlying dispute between the American unions and the foreign vessels. None of the cases cited by Petitioners dictate a contrary conclusion.

2. Finality

The pivotal issue in Petitioners' argument that the instant temporary injunction violates their First and Fourteenth Amendment guarantees of free speech is whether their picketing was "counter to valid State policy." *Teamsters Local 695 v. Vogt*, 354 U.S. 284, 291 (1957). The Alabama courts so concluded. However, Petitioners argue that those courts made incorrect inferences from, and gave too much weight to, the testimony of the unions' witness, Mr. Louis Neira, whom Petitioners characterize as a "low level functionary" (Pet. brief at 25). That argument as to the weight and significance of Mr. Neira's testimony underscores that the present appeal of a temporary injunction is not a "final judgment or decree" under 28 U.S.C. §1257.

The Supreme Court of Alabama clearly stated that the trial court's granting of the temporary injunction did not decide the merits of the controversy and that "a substantial question remained to be decided" on final hearing (App. 22a). Under settled Alabama law, the purpose of a temporary injunction is to maintain the status quo until a final hearing can be had on the merits of a controversy. It is issued when, in the trial judge's discretion, the case presents "a substantial question to be decided" and the immediate circumstances require him to act to preserve such question in its present state (App. 21a-23a). The granting of a temporary injunction is committed to the sound discretion of the trial judge, taking into consideration the relative advantages and disadvantages to the parties

resulting from his granting or refusing to grant the injunction (22a). His decision is reviewable only for abuse of discretion (App. 22a).

The case at bar is an appeal of an interlocutory order of the Circuit Court of Mobile County, Alabama. It is not a decision on the merits, nor was it reviewed by the Supreme Court of Alabama on that basis. The controversy involves a disputed question of fact, which the Alabama Supreme Court deemed "substantial," and which might be resolved differently upon further hearing. Issuance of a permanent injunction is not a foregone conclusion. Therefore, at this juncture, the case lacks the finality requisite for this Court's review. Compare *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Resolution of the constitutional issue should come only after final resolution of the disputed factual issues.

3. Free Speech

The Alabama Supreme Court held that Petitioners' picketing for the purposes described by their witness, Mr. Neira, was counter to Alabama policy. That court determined that there was sufficient evidence in the record from which to conclude that Petitioners' picketing had the aim of closing the Alabama State Docks and, therefore, the Port of Mobile, to foreign shipping. The court held that such activity constituted an unlawful interference with Respondents' businesses and that the trial court did not abuse its discretion in maintaining the status quo by granting a temporary injunction pending a hearing on the merits.

There is a broad field in which a state in enforcing some public policy can constitutionally enjoin peaceful picketing aimed at preventing the effectuation of that policy. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

Although picketing has an ingredient of communication, it cannot dogmatically be equated with constitutionally protected free speech. *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950). Picket lines may induce action of one kind or another irrespective of the nature of the ideas being disseminated (*Hughes v. Superior Court*, 339 U.S. 460 (1950)), particularly where, as here, there is evidence that the picketing is a signal intended to trigger work refusals by other organized workers. Therefore, picketing is not the inevitable legal equivalent of speech *(Hughes, supra)* and is not beyond a state's control if its purpose is "counter to valid state policy in a domain open to state regulation." *Teamsters Local 695 v. Vogt*, 354 U.S. 284, 291 (1957).

This Court has declared that its role in these cases is to review the balance struck by state courts between the interests of those picketing and the competing interests of state policy. *Vogt*, 354 U.S. at 290. While Alabama's judgment on striking such a balance is subject to the limitations of the Fourteenth Amendment, it comes to this Court "bearing a weighty title of respect." *Hanke*, 339 U.S. at 475. The Court should not seek to assess the wisdom of Alabama's policy (*Carpenters & Joiners Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942)); its inquiry is whether the State of Alabama "has struck a balance so inconsistent with rooted tra-

ditions of a free people that it must be found an unconstitutional choice." *Hanke*, 339 U.S. at 479.

This Court has held in analogous cases that it is constitutionally permissible for a state to prohibit picketing for the purpose of interfering with the state's public facilities. *Cox v. Louisiana*, 379 U.S. 559 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). Here the Alabama court sustained the temporary injunction on evidence that an aim of the picketing was to "shut the whole State Docks down (to foreign shipping) ..." (App. 130a). Since the Alabama State Docks is owned and operated by the state for the benefit and use of its citizens, Alabama courts could constitutionally determine that the overriding interests of the citizens of Alabama in keeping open the state's public facility justified the temporary restraining of Petitioners' picketing.

Moreover, the Alabama courts could permissibly determine that such picketing would be "so detrimental .. to the citizenry ... as dependent on goods carried in foreign bottoms as is ours" (*Windward*, 39 L.Ed.2d at 202), that Alabama's substantial social and economic interest in the free flow of foreign commerce through its only seaport outweighed the interest of Petitioners to cause longshoremen to boycott foreign ships because the wages paid to crewmen on those ships were less than wages paid to American seamen.

ARGUMENT

I.

The Alabama State Court Had Jurisdiction To Enjoin Petitioners' Picketing of Foreign-Flag Vessels In The Port of Mobile

Despite the Court's decision earlier this year in *Windward Shipping (London) Ltd. v. American Radio Association*, ____ U.S. ____, 94 S. Ct. 959 (1974), Petitioners argue that the jurisdiction of the Alabama state courts to enjoin Petitioners' picketing was pre-empted by the exclusive jurisdiction of the National Labor Relations Board. In *Windward* the Court held that the jurisdiction of Texas state courts over identical picketing was not pre-empted by the NLRB because the picketing interfered with the maritime operations of foreign vessels and, therefore, was not "in commerce" within the meaning of the National Labor Relations Act.

Petitioners attempt to distinguish *Windward* from the case at bar on two bases. One attempted distinction is contained in footnote five of Petitioners' brief wherein they argue that the rationale of *Windward* was limited to picketing of foreign-owned, foreign-flag vessels and left open the pre-emption question with respect to American-owned, foreign-flag vessels "flying Panamanian, Liberian or Honduran flags." Since *Windward* in fact involved picketing of Liberian-flag vessels and since the picketing by Petitioners in this case was planned to be directed against *all* foreign-

flag vessels in the Port, regardless of ownership,* and was in fact directed to English and Philippine vessels for approximately two days, Petitioners' claimed distinction is not supported in fact. Even if there were factual support for Petitioners' claimed distinction, the Court has considered and rejected the same argument in *McCulloch v. Marineros de Hondurus*, 372 U.S. 10 (1963). In that case, the Court held that the National Labor Relations Board improperly assumed jurisdiction to order an election involving foreign crews of foreign-flag ships. It was argued, as Petitioners argue here, that the factual situation in *McCulloch* was different than the Court had considered six years earlier in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), because *Benz* involved a foreign-owned ship, whereas the vessel in *McCulloch* was effectively American-owned. There the NLRB argued that under its "balancing of contacts" theory there were sufficient American contacts to give it jurisdiction. The Court rejected that argument stating:

> "But to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturb-

*The unions' witness, Mr. Neira, testified: "[w]e were going out and strike every foreign-flag ship in the Port of Mobile" (App. 107a). He also testified that he received instructions to picket "all foreign flag ships" ("every one") within his resources (App. 123a, 124a, 126a), although the picketing was later limited to vessels with crews different from the flag of the vessel. There is nothing in the record which indicates that any of the vessels picketed were American owned.

> ance not only in the field of maritime law, but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely ad hoc weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice. The question, therefore, appears to us more basic; namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19.

As the Court held in *McCulloch*, the basic question is not who owns the vessels, but whether the ships are "foreign registered vessels employing alien seamen." It is uncontroverted in the present case that the vessels picketed by Petitioners were foreign registered vessels employing alien seamen. Thus, Petitioners' argued distinction is not only unsupported factually, it has no legal justification.

The gist of Petitioners' second attempted distinction between *Windward* and the case at bar is that because this suit was filed by American stevedores, and not foreign shipowners, the dispute is between American parties and is "in commerce" within the meaning of the National Labor Relations Act.* Petitioners mis-

*Both the Petitioners and the AFL-CIO, as *amicus*, seem willing to concede that Petitioners' conduct may have violated the National Labor Relations Act. Yet they also argue that the Fourteenth Amendment prohibits the State of Alabama from

read *Windward*. The *ratio decidendi* of *Windward* was that because the picketing interfered with the maritime operations of foreign-flag vessels, the picketing was not "in commerce" and did not come within the jurisdiction of the National Labor Relations Board. It was not crucial in *Windward* that injunctive relief was sought by the foreign shipowners whose ships could not be loaded or unloaded, rather than the American stevedores who were responsible for the loading and unloading of the vessels. Certainly the American stevedores have been injured by Petitioners' conduct even though the picketing was directed at the foreign vessels. The stevedore so injured has the right to seek legal redress for the tort committed, and the Alabama Supreme Court so recognized (App. 26a). See also *Fruit Dispatch Co. v. National Maritime Union*, 138 So.2d 853 (1962).

Nor is *Local Union No. 25 v. New York, New Haven & Hartford Railroad Co.*, 350 U.S. 155 (1956) ("the *Piggyback* case"), which was cited by Petitioners, supportive of their position. In that case a railroad, whose labor relations were regulated by the Railway Labor Act, obtained a state court injunction against picketing by the Teamsters Union who protested trucking companies "piggybacking" truck trailers on railroad cars.

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regulating the same conduct. As discussed above, we believe that the Court in *Windward* foreclosed any notion that the NLRB has jurisdiction. Thus, since the same constitutional limitations apply to Congress as to the states, Local 501, *IBEW v. NLRB*, 341 U. S. 694 (1951), the claims of NLRB proscription advanced in support of Petitioners' pre-emption arguments do no more than demonstrate the weakness in Petitioners' constitutional arguments.

The railroad was exempt from the definition of "employer" in the National Labor Relations Act; however, the Court held that the railroad was not precluded from seeking relief from the NLRB and that state court jurisdiction was pre-empted. Petitioners argue that the *Piggyback* case is authority for the proposition that the NLRB has exclusive jurisdiction over picketing they say is allegedly violative of §8(b)(4) of the Act, even though the picketing is directed at parties whose employer-employee relations are not subject to the Act's coverage.

In *Incres Steamship Co. v. Maritime Workers Union*, 372 U.S. 24 (1963), the Court considered the *Piggyback* decision, pointing out that it was fundamental to the decision that the action was brought by the railroad under "circumstances unrelated to its employer-employee relations" in a situation where the union "was in no way concerned with [the railroad's] labor policy." 372 U.S. at 27.

In the case at bar, contrary to the situation in the *Piggyback* case, and very much like that in *Incres*, the Petitioners' picketing is vitally concerned with the carrier's labor policy in circumstances directly related to its "employer-employee relations." Here the picketing was to protest "substandard" wages paid to the crews of the foreign-flag vessels picketed; wages which were set by the ships' articles of agreement. Thus, Petitioners' picketing directly concerned the vessels' "employer-employee relations" and its "labor policy," in sharp contrast to the picketing in the *Piggyback* case. Consequently, the *Piggyback* rationale

does not apply here to deprive the state courts of jurisdiction to enjoin Petitioners' tortious conduct.

Petitioners' reliance on *Grain Elevator Workers v. NLRB*, 376 F.2d 774 (D.C. Cir. 1967) and *Madden v. Grain Elevator Workers Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied* 379 U.S. 967 (1965), is misplaced. Both cases arose as a result of a work stoppage by employees "working in a domestic plant of [an] American employer" (334 F.2d at 1019) and directed against the American employer in the absence of any picketing of foreign vessels. Neither case dealt with the right of American unions to picket foreign-flag vessels for the intended purpose of imposing American wages and working conditions and/or requiring the hiring of American seamen at American wages and conditions as a condition precedent to unimpeded access to United States ports. In both cases the courts concluded that the concerted activities of the employees did not interfere with the internal affairs of the vessels involved and did affect the "interstate movement of grain" and, thus, interstate commerce. 334 F.2d at 1019 and 376 F.2d at 776. Contrariwise, picketing of the type under consideration here was held by the Court in *Windward* to interfere with the internal affairs of the vessels picketed and, thus, not to be "in commerce" within the meaning of the National Labor Relations Act.

In arguing that the instant fact situation is distinguishable from that in *Windward*, Petitioners would have the Court grant them what was denied

them in the former case, to-wit: NLRB review of picketing which interferes with the maritime operations of foreign-flag vessels. They seek to gain through indirect means what was denied to them in *Windward*. Acceptance of Petitioners' argument would mean that the forum would depend on the identity of the party complaining of the activity in question. That is, a foreign shipowner would seek redress in state courts whereas the American stevedore would be relegated to the National Labor Relations Board.

II.
The Constitutional Question Should Not Be Decided In The Absence Of A Final Judgment

This case comes to the Court for review of an interlocutory order of the Circuit Court of Mobile County, Alabama. Thus, as a threshold issue the Court must decide if that order is a "final judgment or decree" subject to review under 28 U.S.C. §1257. The importance of the issue is intensified by the constitutional question raised by Petitioners.

Much of what Petitioners urge in support of their contention that their picketing activities were protected by the First and Fourteenth Amendments rests upon their claim that the Alabama Courts gave too much emphasis to the testimony of Louis Neira concerning the purpose of the picketing (Pet. brief at 24-26). They contend that the erroneous resolution of this disputed issue, viz: the purpose or object of the picketing, requires reversal. Of course, Petitioners' argument ignores the fact that Mr. Neira was the only witness

called by them to testify on their behalf and that it was Mr. Neira whose affidavit was introduced in an effort to prove other factual contentions advanced by Petitioners. Aside from the issue of whether or not the Petitioners should thus be bound by Mr. Neira's testimony, or what significance it should be given, such evidentiary issues are better left for review following a hearing on the merits.

The Alabama Supreme Court emphasized in its review of this temporary injunction that "a substantial question remained to be decided" in the case (App. 22a). It concluded:

> "... This situation called on the trial judge to exercise his discretion as to whether or not to grant a temporary injunction to maintain the status quo until a full hearing could be had before the court on the merits of the case. In his decision, he did not, in our opinion, abuse his discretion. We find no error in the trial judge's granting the writ of temporary injunction." App. 26a.

Under Alabama law, it is not the purpose of a temporary injunction to decide the merits of the case (App. 22a). As was stated in *Berman v. Wreck-A-Pair Co.*, 234 Ala. 293, 298, 175 So. 269, 274 (1937):

> "Such an injunction does not depend on any advance finding for complainant on the merits. If, upon consideration of the bill, exhibits, supporting affidavits and evidence, also the answer, exhibits, supporting affidavits and evidence on the part of respondent, it shall reasonably appear that balancing inconvenience, probable injury, and making effective the relief sought, it is found advisable to preserve the status quo, such an injunction may and should be granted. Rather wide discretion is given the trial court in this regard."

Thus, in its present posture, the case at bar lacks the finality requisite for this Court's review. It is in the same posture as was *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178 (1952), and *Taggert v. Weinacker's Inc.*, 397 U.S. 223 (1970), two Alabama cases in which writs of certiorari requesting review of temporary injunction orders were dismissed as having been improvidently granted because the orders lacked finality. *See also AFL v. Swing*, 309 U.S. 659 (1940), in which this Court denied certiorari after the temporary injunction issued, but subsequently granted certiorari after the permanent injunction issued.

The present case is markedly different from *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), where the Court reviewed a preliminary injunction which issued after a full hearing and which was accompanied by detailed findings of fact by the trial court. *See Keefe v. Organization for a Better Austin*, 115 Ill. App.2d 236, 253 N.E.2d 76, 78-79 (1969). In *Keefe*, the Court observed:

> "We see nothing in the record that would indicate that the Illinois courts applied a less vigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality." 402 U.S. at 418, n. 1 (citation omitted).

In contrast to the situation in *Keefe*, the case *sub judice* was reviewed by the Alabama Supreme Court using a lesser standard than it would use to review the granting of a permanent injunction. Compare *Parker v. Ebsco Industries, Inc.*, 282 Ala. 98, 209 So.2d 383 (1968), and *Poyner v. Whiddon*, 234 Ala. 168, 174 So. 507 (1937). The temporary injunction granted by the trial court was approved "to maintain the status quo until a full hearing could be had before the court on the merits of the case" (App. 26a), when a "substantial question" would have to be decided (App. 23a). Thus, it is apparent that unlike the situation in *Keefe* where "the issuance of a permanent injunction ... [would] be little more than a formality" (402 U.S. at 418, n. 1), issuance of a permanent injunction in the present case is far from a foregone conclusion. Petitioners' factual arguments concerning the purposes of their picketing and the significance of Mr. Neira's testimony remain to be finally resolved after a full

evidentiary hearing. Resolution of the constitutional issue should come only after such final resolution of these factual issues.

III.

Petitioners' Picketing For The Purpose of Shutting Down Alabama's Public Port Facility To Foreign Shipping Provided The Alabama Court With A Constitutionally Permissible Base For Enjoining Such Picketing.

Discussion of the constitutional protection given picketing must begin with *Thornhill v. Alabama*, 310 U.S. 88 (1940). There the Court held unconstitutional an Alabama statute which prohibited all picketing near the premises of an employer involved in a labor dispute. The Court was not called upon to determine the legality of the picketing. It merely had to determine the constitutionality of the statute which had been construed as proscribing all picketing, regardless of where, why, or how it was conducted. Although the holding in *Thornhill* did condemn state bans of all picketing, it did not prohibit every restraint of picketing. Indeed, the Court observed that it was the "power and the duty" of a state to "preserve the peace and to protect the privacy, the lives, and the property of its residents," but that those interests of the community must be balanced against the interest of individuals in freedom of discussion on matters of public concern. 310 U.S. at 105. The vice of the sweeping Alabama statute which banned all picketing was that it did not evidence "such care in balancing these interests" as was constitutionally required. *Ibid.*

Although the Court used broad language in *Thornhill*, the Court's subsequent limitations on this language have been so substantial so as to cause a minority of the Court in 1957 to complain that since *Thornhill*, "The Court has now come full circle... The retreat began in *(Hanke, infra)* . . . Today, the Court signs the formal surrender." *Teamsters Local 695 v. Vogt*, 354 U.S. 284, 295-97 (1957).

In rendering the Court's decision in *Vogt*, Justice Frankfurter carefully traced the evolution of the concept that states can enjoin picketing in violation of a valid public policy of the state. Noting the broad pronouncements in *Thornhill*, which seemed to elevate peaceful picketing to the level of freedom of speech, he observed:

> "Soon, however, the Court came to realize that the broad pronouncements, but not the specific holding, of *Thornhill* had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated.
>
> ....
>
> "The implied reassessments of the broad language of the *Thornhill* case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation." 354 U.S. at 289, 291.

Justice Frankfurter noted that "decisive reconsiderations" came in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) and observed that cases subsequent to *Thornhill* "made manifest that picketing, even though 'peaceful', involved more than just communication of ideas and could not be immune from all state regulation." *Ibid.* The Court recognized that picketing often conflicts with other legitimate interests which the states have a right to protect:

> "[The cases after *Thornhill*] demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the *balance* struck by a State between picketing that involved more than 'publicity' and competing interests of state policy.
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> ....
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> "[The cases after *Thornhill*] established a broad field in which a state, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." 354 U.S. at 290, 293 (emphasis added).

One of the cases to which Justice Frankfurter referred in *Vogt* was *Hughes v. Superior Court*, 339 U.S. 460 (1950). There, the Supreme Court in a unanimous opinion held a California state court had properly enjoined picketing in violation of a valid state policy. The Court, in rejecting the claim that the picketing

was constitutionally protected free speech, spoke in very clear terms:

> "The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use....
>
> ....
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> " . . . It has been amply recognized tha picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the *manner* in which picketing is conducted or the *purpose* which it seeks to effectuate gives ground for its disallowance." 339 U.S. at 464-66 (emphasis added).

The Court's reluctance to equate picketing with speech rests upon the Court's recognition that it involves more than communication. In *Hughes*, 339 U.S. at 464-65, the Court approvingly cited Justice Douglas' concurring opinion in *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942) to this effect:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." 315 U.S. at 776.

The Court has also noted that although "picketing has an ingredient of communication, it cannot dogmatically be equated with the constitutionally protected [free] speech." "Our decisions" said the Court, "reflect recognition that picketing is 'indeed a hybrid.' " *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950). In *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) the Court observed:

> "[P]icketing involves elements of both speech and conduct, i.e., patrolling, ... and because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech." 391 U.S. at 313.

As vividly demonstrated by the record here, picketing by organized labor involves much more than communication. A union picket line is ordinarily a boycott signal which triggers work refusals by other organized workers when it is located in the path of such workers providing supplies or services to the target employer, irrespective of the contents of the picket signs. As stated by Professor Thomas Emerson in his book, *The System of Freedom of Expression:*

> ". . . [T]here is a fundamenetal difference between most labor picketing and most non-labor picketing. Labor picketing normally has a special kind of economic impact, derived from its institutional setting. An employer who is picketed is usually sealed off from many eco-

nomic contacts by the tradition that union labor will not cross the picket line. This form of pressure is applied by closely knit, powerful organizations, with membership in the thousands or hundreds of thousands and a nationwide network of affiliates. It is supported by a system of power based upon common economic interests, loyalties, social pressures, economic sanctions, and bureaucratic force. A labor picket line is thus not so much a rational appeal to persuasion as a signal for the application of immediate and enormous economic leverage, based upon an already prepared position. As such it must, under ordinary circumstances, be classified as action, rather than expression." T. Emerson, *The System of Freedom of Expression* 445 (1970).

Indeed, Congress has recognized that union picketing is often a signal to other groups of organized workers to refuse to cross the picket line, rather than an effort to inform members of the public. Professor Archibald Cox, who worked with the Senate Labor Committee Chairman on the Section 8(b)(7) amendment to the Taft-Hartley Act, has said:

"Picketing before a union election is divided by Section 8(b)(7) into two categories: (1) picketing which halts pick-ups or deliveries by independent trucking concerns or the rendition of services by the employees of other employers, and (2) picketing which appeals only to employees in the establishment and members

of the public.... The theory is that the former class of picketing is essentially a signal to organized economic action backed by group discipline. Such economic pressure, if continued, causes heavy loss and increases the likelihood of the employer's coercing the employees to join the union. In the second type of picketing, the elements of communication predominate. If the employer loses patronage, it is chiefly because of the impact of the picket's message upon members of the public acting as individuals." *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. R. 257 (1960).

This construction has been given judicial approval. In *NLRB v. Local 3, IBEW*, 317 F.2d 193 (2nd Cir. 1963), the court discussed the proviso in Section 8(b)(7)(C) of the Act as follows:

"This proviso gives the union freedom to appeal to the unorganized public for spontaneous popular pressure upon an employer; it is intended, however, to exclude the invocation of pressure by labor groups or members of unions, as such.

The permissible picketing is, therefore, that which through the dissemination of certain allowed representations, is designed to influence members of the unorganized public, as individuals, because the impact upon the employer

by way of such individuals is weaker, more indirect and less coercive.

....

. . . In its context the . . . proviso means in terms of 'signal' and 'publicity' picketing that while most picketing with a 'signaling' purpose is proscribed, most picketing for publicity is protected....

....

The Board must, therefore, approach its conclusion as to whether or not the picketing was 'for the purpose of truthfully advising the public' by way of a finding of whether or not the union's tactical purpose was to signal economic action, backed by organized group discipline," 317 F.2d at 198-200.*

Although the Petitioners assert in their brief that their picketing was nothing more than an appeal to the public to "ship American," it seems obvious that the picketing was intended and designed as a "signal" to stop loading and unloading the vessels picketed. Mr. Neira admitted that no thought was given to timing the picketing so that it would not interfere with the longshoremen's call-out time (App. 127a). Indeed, questioning of Mr. Neira as to why the pickets were not placed so that they did not interfere with the longshoremen prompted Petitioners' counsel to remark:

*In subsequent proceedings the Second Circuit specifically considered the free speech question and concluded that proscription of signal picketing does not violate the First Amendment. *NLRB v. Local 3, IBEW*, 339 F.2d 600 (2nd Cir. 1964).

"Your Honor, this shows an incredible ignorance of what a picket line is supposed to do." (App. 128a).

Mr. Neira admitted that it is "definite" that most Union men don't cross picket lines (App. 116a) and his counsel said that, "based upon past practice of the longshoremen to not cross picket lines," the Petitioners "fully expected" longshoremen not to cross their lines (App. 117a, 118a). As the Petitioners most certainly knew, it did not matter what their picket signs said, the nature of waterfront life is such that picket lines are to be honored, particularly where they are established by affiliated unions.

Surely, the foregoing evidence, when considered in light of the initiation of the picketing at a time which coincided with the court ordered return to work by longshoremen, belies any claim that the picketing had purely "informational" aims. If the Petitioners wish to argue otherwise, a more complete record could perhaps enable them to do so. At this stage, however, their claims ring hollow. Accordingly, Petitioners' reliance on this Court's decision in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) is misplaced. In that case, the Court held that the state's trespass laws could not be applied in such a way as to prevent the communication of ideas to the patrons of a supermarket. The picketing in that case took place in the parcel pick-up area frequented by customers and its sole purpose was to ask customers not to patronize the store. Nothing in the opinion suggests that the picketing was intended to or that

it did interfere with services provided by union labor to the store. It was not a signal to organized labor to cease performing services for or making deliveries to the store.

It was initially noted in *Thornhill* that a state's regulation of picketing required a "balancing" of competing interests. 310 U.S. at 105. Indeed, in *Vogt*, the Court observed that the cases which followed involved "not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy." 354 U.S. at 290.

Recognition of the necessity of the "balancing of competing interests" was succinctly stated in *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950), when the Court observed:

> "[W]e must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid.' (citation omitted) The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the state to set the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama*, 310 U.S. 88, 104, 84 L.Ed. 1093, 1103, 60 S. Ct. 736. A state's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a state's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect. 339 U.S. at 474-75.

In *Hanke*, the union picketed in protest that two self-employed car dealers were keeping their businesses open beyond the hours which the union had negotiated with other car dealers. Similarly, the unions here were picketing to protest that the wages paid to foreign crews on foreign ships were less than those negotiated by the union with the owners of American ships. The picketing in *Hanke* was peaceful, but it triggered a refusal by drivers for supply houses to deliver parts and other needed material to the car dealers.

The Court considered the interplay of social-economic interests: "Unions obvicusly are concerned not to have union standards undermined by non-union ships." *Id.* at 475. On the other hand there was an interest in preserving the economic units against whom the picketing was directed.

> "Whether to prefer the union or a self-employer in such a situation, or seek partial recognition of both interests, and, if so, by what means

> to secure such accommodation, obviously presents to a state serious problems. There are no sure answers and the best available solution is likely to be experimental and tentative, and always subject to the control of the popular will. That the solution of these perplexities is a challenge to wisdom and not a command of the Constitution is the significance of [the *Senn* case]." *Id.* at 475-476.

The Court held:

> "... we cannot concude that [the state], in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that [the state] has offended the Constitution." *Id.* at 478-79.

Here, the ban on Petitioners' picketing followed a judicial inquiry into its conduct and purposes. There was no blanket prohibition on picketing, rather, the injunction was given only after an adversary hearing before the state trial court. This injunction was reviewed and sustained by the Supreme Court of Alabama. This Court is called upon to review the balance struck by the courts of Alabama between the interest

of those picketing and competing interests of state policy.* *Vogt*, 354 U.S. at 290. While, naturally, Ala-

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*The failure of the trial judge to enter factual findings to support his order awarding interlocutory relief to Respondents does not, as Petitioners contend, provide this Court with a basis for inferring that there were no valid policies supporting issuance of the temporary injunction. The rules of practice in Alabama at the time did not require the entry of such findings. *See Loftin v. Parker*, 253 Ala. 98, 42 So.2d 824 (1949). Title 7, §1056 of the Alabama Code (1958) was the only statute which specifically referred to the trial court's obligations on issuing an order granting such an injunction and it required only that the judge "endorse upon the bill (of complaint) his fiat to that effect . . ."

Since the entry of the order in question, Alabama has adopted rules of civil procedure patterned after the Federal Rules of Civil Procedure; but unlike the Feders' Rules, the entry of findings in ruling on interlocutory relief is discretionary and not mandatory. Rule 52. *Ala. Rules of Ct.* In 2 Lyons, *Alabama Practice* (1973), the author, who was the official reporter for the Advisory Committee which formulated the Alabama rules, summarizes the pertinent provisions of the current rules and offers his opinion as to why the rules do not require issuance of findings:

> "This rule departs from the federal version in that findings of fact and conclusions of law are not mandatory unless required by statute. Any party may request findings and conclusions but the allowance of the request is entirely in the court's discretion. Required findings will perhaps have to await the day when the necessary supportive personnel are available to the bench." 2 Lyons, *Alabama Practice* 52.2 (1973

Finally, we know of no decision by this Court which holds that the failure of a state trial court to make findings impairs the validity of its order. Indeed, in *Teamsters Local 695 v. Vogt*, 354 U. S. 284 (1957), the trial court had refused to make certain requested findings concerning the purpose of picketing sought to be enjoined. Nevertheless, the Wisconsin Supreme Court made such findings based upon the record below and, on the basis of such findings, held that the picketing was properly enjoined. This Court, noting that the purpose of the picketing in question had been inferred from the record by the Wisconsin Supreme Court rather than found by the trial court, concluded that "the circumstances set forth in the opinion of the Wisconsin Supreme Court afforded a rational basis for the

bama's judgment on striking such a balance is subject to the limitations of the Fourteenth Amendment, it comes to this Court "bearing a weighty title of respect." *Hanke*, 339 U.S. at 475. In *Carpenters & Joiners Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942), which involved the review of an injunction issued by Texas state courts, the Court placed the following self-imposed limitation on its review of state policies which would support the enjoining of peaceful picketing:

> "It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law." 315 U.S. at 728.

The question is whether the State of Alabama "has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice." *Hanke*, 339 U.S. at 479.

Petitioners' picketing was restrained pursuant to the Alabama doctrine, well established at common law, against unlawful interference with the business of another. *See, e.g., Dorchy v. Kansas*, 272 U.S. 306 (1926); *Thompson v. Allstate Insurance Co.*, 476 F.2d 746 (5th Cir. 1973); and *Pennington v. Birmingham Baseball Club* 277 Ala. 336, 170 So.2d 410 (1964).

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inference it drew concerning the purpose of the picketing" 354 U. S. at 295, and provided a sufficient basis upon which an injunction could be issued by the court.

> "[T]he right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected if necessary, by injunctive process." (App. 20a, quoting *Pennington, supra*).

Without question, Petitioners' picketing interferred with Respondents' businesses. The Alabama Supreme Court found sufficient evidence in the record to conclude that such picketing was designed to interfere with the operations of the Alabama State Docks and to close the Port of Mobile to foreign shipping. Since such interference was an intended purpose or objective of Petitioners' picketing, and not just an incidental effect thereof, their activity controvened policies of the State and was unlawful. Hence, Petitioners' picketing was both "unlawful" and an "interference" with Respondents' businesses and was properly restrained temporarily until a full hearing could be had on the permanent injunction.

Obviously, Petitioners' picketing were more than a mere publication of the fact that American seamen were losing jobs to foreign shipping. The Petitioners' "appeal" was not directed to the public not to patronize the shippers; it was a "signal" to other unionized workers to refuse to load or unload the ships. The picketing was done in such a manner that, coupled with established union policies and traditions, it resulted in longshoremen, members of a sister union, refusing to work. As the Alabama Supreme Court noted, there was ample evidence from which to conclude that the purpose of the picketing was to close

the Alabama State Docks to all foreign shipping (App. 25a, 26a).

Surely, it is well within the constitutional power of the states to determine that its interests in providing foreign vessels free access to its port facilities with the consequent benefit to all of its citizens outweighs the interests of Petitioners to close the port to such shipping because the wages paid to foreign crewmen on such ships are less than they are paid. This is particularly so where, as here, such port facilities are owned and operated by the state.*

In analogous situations this Court has recognized that persons can be constitutionally prohibited from picketing for the purpose of intentionally interfering with the normal operations of public facilities. Its holdings in this area were summarized in *Amalgamated*

*Authority for the establishment of the Alabama State Docks was first provided by Amendment 12 to the Constitution of Alabama. By that amendment, the state was authorized to appropriate funds and engage "in the work of internal improvement, or promoting, developing, constructing, maintaining, and operating all harbors and seaports within the state or its jurisdiction, provided, that such work or improvement shall always be and remain under the management and control of the state, through its State Harbor Commission, or other governing agency." In 1957, Amendment 116 to the Alabama Constitution provided that the state could incur an indebtedness for the "promoting, developing, constructing, maintaining and operating along navigable streams or waterways . . . all manner of docks, facilities, elevators . . . and improvements needful for the convenient use of the same, in aid of commerce and use of the waterways of the state . . ." Chapters 1-A through 1-L of Title 38 of the *Alabama Code* (1958) contain an exhaustive legislative provision for the development and operation of the port facilities by the State of Alabama.

Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), as follows:

> "Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the state. Thus we have upheld a statute prohibiting picketing 'in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any ... county ... courthouses.' (citation omitted.) Likewise it has been indicated that persons could be constitutionally prohibited from picketing 'in or near' a court 'with the intent of interfering with, obstructing, or impeding the administration of justice.' (citation omitted.)
>
> In addition, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it." 391 U.S. at 320, 321.

One of the cases the Court had reference to was *Adderley v. Florida*, 385 U.S. 39 (1966), where it was held that the state could prohibit demonstrations on jail grounds:

> "The state, no less than a private owner of property, has power to preserve the property

> under its control for the use to which it is lawfully dedicated ... The United States Constitution does not forbid a state to control the use of its own property for its own lawful nondiscriminatory purpose." 385 U.S. at 47, 48.

See, also, *Cox v. Louisiana*, 379 U.S. 559 (1965), where the Court upheld a statute totally barring demonstrations near courthouses.

Here an admitted aim of Petitioners' picketing was to "shut the whole State Docks down (to foreign shipping) . . ." (App. 130a). Petitioners' activities to that end thus came into collision with the interests of the citizens of Alabama in the unimpaired operation of the State Docks. In striking the balance that it did, we submit that the state was acting well within the constitutional authority granted it.

As a corollary to the state's interest in halting intentional interference with its public port facilities, Alabama certainly has substantial social and economic interests in the free flow of foreign commerce through its port. The judgment of the state courts in giving more weight to such interests than to the interest of American unions to cause foreign ships to be boycotted by longshoremen because the wages paid to crewmen on those ships are less than those paid to American seamen, should come to this Court "bearing a weighty title of respect." *Hanke*, 339 U.S. at 475.

Indeed, there have been several cases before this Court in which other courts have struck the same

balance. *Incres Steamship Co. v. Maritime Workers Union*, 372 U.S. 24 (1963); *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960); *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957). Although the constitutional question was not decided by the Court in those cases, the lower court decisions demonstrate the widely recognized view that intentional interference with foreign shipping is tortious and may be properly enjoined. Similar results were reached in *Upper Lakes Shipping v. S.I.U.*, 18 Wis. 2d 646, 119 N.W.2d 426 (1963) and *Fruit Dispatch Co. v National Maritime Union*, 138 So.2d 853 (La. App. 1962).

The Petitioners may contend here that this case is different from the cited cases because Petitioners are not seeking to represent or organize the foreign seamen employed on foreign-flag ships *(Incres)* nor are they seeking to help them in a dispute which those foreign seamen have with their employer *(Benz)*, Petitioners may claim that since there is no direct interference with the relationship between the foreign employer and the foreign crewmen, their picketing is not tortious. But that argument ignores the fact that the pickets carried signs protesting the low wages paid by the foreign shipowners to their crew. Taking the unions at their word, an immediate objective of the picketing must have been to force the foreign shipowners to pay higher wages and benefits to their crewmen than were required by the foreign articles or negotiated by their foreign unions. In fact, Mr. Neira admitted during

cross-examination that reaction by the foreign crews of the vessels was an object of the picketing:

(App., 13a, 139a)

"Q. ... And you want these crews on these foreign flag vessels to react against these foreign flag owners and make those owners raise those wages of those crews, don't you?

A. That would be nice.

....

Q. ... But if these men benefit from this on these foreign vessels and go to their owner and make their owner raise their wages to the point where those owners have to pay equivalent wages to the American seamen, that's what you want, isn't it, Mr. Neira?

A. Yes, sir."

This is precisely the objective that the unions pursued in *Benz* and *Incres*. That the unions are trying to achieve their objective from the dockside, as it were, rather than by representation of crewmen, hardly lessens the impact on the foreign-flag ships. This impact and the likely result of the picketing were discussed by the Court in *Windward* as follows:

"The picket signs utilized at the docks where the *Northwind* and *Theomana* were tied up protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United

States. At the very least, the picketers must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large scale increase in operating costs would have more than a negligible impact on the 'maritime operations' of these foreign ships, and the effect would be by no means limited to costs incurred while in American ports....

"In this situation, the foreign vessel's lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacer-

bate and broaden the present dispute." 39 L.Ed.2d at 202.

In *Windward*, the Court concluded by noting that none of the predictable responses of the foreign-flag shipowners would provide any wage benefits to Petitioners' members. Similarly, there are virtually no responses available to American shippers and consignees and, indeed, the American public which could alleviate the conditions which gave rise to the picketing. There is nothing a stevedoring company, or a ship's agent, or the public can do except appeal to Congress for the initiation of some sort of long-range project to provide relief to the American seamen who, presumably, claim the power to determine the adequacy of such relief.

Petitioners claim they were justified in inflicting severe economic loss on persons having no control over their complaints so that they could prompt action in Washington, yet only a year or so prior the entire question had been given close attention by Congress, which had taken positive action to deal with the problem on a broad scale. In 1970 a greatly expanded program for aiding the American merchant marine was enacted as the Merchant Marine Act of 1970, P.S. 91-469, 84 Stat. 1018 (1970).

In enacting this new maritime program, Congress recognized that "[i]n general, merchant ships of the world trade internationally in accordance with prin-

ciples of freedom of the seas and open ports,"* and embarked on an extensive program designed to make American ships competitive with foreign ships. This program includes direct subsidies to American shipowners to make up the difference in the costs of operating United States-flag and foreign-flag vessels, construction subsidies to make up the difference between ship construction costs in the United States and abroad, and important special tax benefits.

Congress presumably could have legislated as part of the Merchant Marine Act of 1970 that, in order to make American-flag ships competitive with foreign-flag ships, only those foreign-flag ships whose crews are paid at American wage levels would be permitted to carry cargo to or from American ports. It did not do so. Nevertheless, Petitioners are urging that this Court accord to them a federally protected power to utilize picketing to bar foreign ships from trading in and out of our ports when in their unilateral opinion such action would further their own interests.

Petitioners have decided that the wages and working conditions of foreign seamen working on foreign vessels under foreign contracts usually negotiated by foreign unions and executed in foreign countries under their labor relations acts are "substandard." They propose to dictate to the world minimum standards of wages and working conditions which must be met before ships will be allowed to use the ports of the United

*S. Rep. No. 91-1080, 91st Cong., 2d Sess., U.S Code Cong. & Ad. News at 4190 (1970)

States. There is no doubt that the Petitioners, unless restrained, have the raw power to accomplish just that. It is a fact of waterfront life that picket lines will not be crossed. The actions of the Petitioners were intended and designed to bring an end to the free and effective access of ships of friendly foreign governments to the Port of Mobile, and other ports of this country, thereby bringing a total disruption of foreign commerce. Such action is "so detrimental ... to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours"* that its restraint was all but mandated. A balance struck any differently by the courts of Alabama would ignore the interests of all but Petitioners.

CONCLUSION

For the foregoing reasons, the granting of the interlocutory order should be affirmed and the case remanded for further proceedings. This Court should not decide the constitutional question until such time as there is a final judgment and the Supreme Court of Alabama has had opportunity to review such judgment. If the Court decides the constitutional question, there is adequate evidence in the record that the picketing was for a purpose which conflicted with valid state policies and that the Alabama state courts

*_Windward_, 39 L.Ed.2d at 195

struck a constitutionally appropriate balance in weighing those interests against the interests of Petitioners.

Respectfully submitted,

Frank McRight
Kirk C. Shaw
Counsel for Respondent
Mobile Steamship Association

OF COUNSEL:
Armbrecht, Jackson & DeMouy
Mobile, Alabama

CERTIFICATE OF SERVICE

I, Frank McRight, one of the attorneys for Respondent Mobile Steamship Association, do hereby certify that on this ____ day of August, 1974, three copies of the foregoing brief were served on all parties required to be served by mailing the same through the United States mail, postage prepaid, to the following attorneys of record:

Howard Schulman, Esq.
Schulman, Abarbanel and Schlesinger
1250 Broadway
New York, New York 10001
and
Otto E. Simon, Esq.
Simon and Wood
1010 Van Antwerp Building
Mobile, Alabama 36602
Attorneys for Petitioners

Alex F. Lankford, Esq.
Hand, Arendall, Bedsole, Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601
Attorneys for Respondent Robert E. Malone

Frank McRight